

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE: . Chapter 11
 .
BUHRE BEVERAGE . Case No. 14-22048 (RDD)
DISTRIBUTION, INC., .
 .
Debtor. .
 .

WILLIAM SANCHEZ, . Adv. Case No. 14-08218 (RDD)
 .
Plaintiff, .
 .
vs. .
 .
BUHRE BEVERAGE .
DISTRIBUTION, INC., . 300 Quarropas Street
 . White Plains, New York 10601
Defendant. .
 . Monday, November 3, 2014
 . 11:40 a.m.

TRANSCRIPT OF MOTION TO APPROVE (1) SALES PROCEDURES;
(2) BIDDING PROCEDURES; (3) BREAKUP FEE, IF APPLICABLE;
(4) THE FORM AND MANNER OF NOTICE; (5) THE SCHEDULE FOR
AN AUCTION AND SALE HEARING; (6) AUTHORIZING THE SALE OF
SUBSTANTIALLY ALL OF THE DEBTOR'S ASSETS FREE AND CLEAR
OF ALL LIENS, CLAIMS, INTERESTS AND ENCUMBRANCES,
GRANTING THE SUCCESSFUL BIDDER GOOD FAITH STATUS,
WAIVING THE TEN-DAY STAY OF THE SALE ORDER, AND
(7) GRANTING SUCH OTHER RELIEF AS PROPER; MOTION TO FILE
PROOF OF CLAIM AFTER CLAIMS BAR DATE; MOTION FOR
RELIEF FROM STAY; MOTION FOR SUMMARY JUDGMENT
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES: (Continued)

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For Thomas Poli and John Brown:	Christopher A. Smith, Esq. TRIVELLA & FORTE, LLP 1311 Mamaroneck Avenue Suite 170 White Plains, NY 10605
For Pepsi-Cola Bottling Company of New York, Inc.:	Thomas A. Waldman, Esq. GREENBAUM, ROWE, SMITH & DAVIS, LLP 75 Livingston Avenue Roseland, NJ 07068
For Soft Drink and Brewery Workers Union Local 812 Retirement Fund:	Susan M. Bruno, Esq. CARY KANE, LLP 1350 Broadway Suite 1400 New York, NY 10018
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1 WHITE PLAINS, NEW YORK, MONDAY, NOVEMBER 3, 2014, 11:40 A.M.

2 THE COURT: Okay. In Re: Buhre Beverage
3 Distributions as well as Sanchez v. Buhre Beverage
4 Distribution. Okay. Are we ready to go ahead?

5 MS. PENACHIO: Yes, Your Honor.

6 THE COURT: Okay. Okay. So there are a number of
7 matters on the calendar today but it seems to me it's probably
8 best to proceed with the sale motion first.

9 MS. PENACHIO: Your Honor, I agree. Anne Penachio
10 for the debtor.

11 THE COURT: Okay. All right. And everyone can sit
12 down unless they're speaking. Just say who you are when you
13 first speak and who you represent.

14 MS. PENACHIO: Your Honor, this is the debtor's
15 motion to approve the sale of the -- substantially all of its
16 assets pursuant to Section 363 and related provisions of the
17 Bankruptcy Code.

18 Your Honor, you approved bidding procedures in or
19 about August 2014. In accordance with those bidding
20 procedures, I actively noticed the sale to all -- or I think a
21 broad range of potential bidders. Approximately ten bidders
22 expressed an inquiry. I promptly sent of anyone that made an
23 inquiry a copy of the bid package.

24 I received one deposit and offer, however -- from Mr.
25 Poli. Unfortunately, Mr. Poli had not been approved by Pepsi

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1 and was not considered a qualified bidder. I returned his
2 deposit upon learning that he was not -- had not been approved
3 by Pepsi and was not qualified. The only -- I would
4 respectfully request that the Court request the debtor's motion
5 to sell the property to the stalking horse bidder, Mr. Cappelli
6 [ph] who's here in the courtroom today.

7 THE COURT: Okay. And he has of course been approved
8 by Pepsi.

9 MS. PENACHIO: Your Honor, he has been approved by
10 Pepsi. There is a letter approving him. And he was the only
11 bidder that is qualified at this point, and I believe that the
12 sum paid is fair and reasonable particularly after aggressively
13 trying to get other people to bid as set forth in my reply
14 affidavit.

15 THE COURT: Okay. All right. I reviewed the
16 objection and declarations filed in connection with this matter
17 including Mr. Israel's declaration. I'm happy to hear from
18 anyone on the objection.

19 MR. MC AULIFFE: Good morning, Your Honor. Michael
20 McAuliffe on behalf of William Sanchez. We had filed a very
21 brief objection to the sale relying principally upon the
22 arguments we've set forth in our adversary proceeding that Mr.
23 Sanchez we believe should be declared to be a secured creditor.
24 We maintain that he's owed in excess on a million dollars. We
25 also believe that the collateral which should be the subject of

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1 his security interest includes the route as well as the trucks.

2 Background, Judge: We had filed a limited objection
3 initially when the debtor brought on the motion to have the
4 sale initially teed up. We submitted a counteroffer. That
5 counteroffer was not approved by Your Honor, and we understood
6 that my client needed to be approved by Pepsi as part of his
7 application.

8 Pepsi had made it abundantly clear to us in the
9 record that he was never going to be satisfactory to them so we
10 never tendered a bid. But we would ask that Your Honor deny
11 the debtor's application based upon the reasons that we believe
12 we will prevail in the adversary proceeding.

13 THE COURT: But if you -- I'm sorry. So the
14 objection is not on the basis that you have a higher and better
15 bid, right?

16 MR. MC AULIFFE: Well, I think there are other
17 parties that are interested. I don't want to speak for them --

18 THE COURT: But yours is not on that basis.

19 MR. MC AULIFFE: No, Judge, because you had said that
20 we needed to be approved by Pepsi in order to tender a bid and
21 --

22 THE COURT: Right.

23 MR. MC AULIFFE: -- since we knew that that was Your
24 Honor's directive, we also knew that Pepsi would never approve
25 us as per their own stated position. So --

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BY: JUDGE
JUDGE - JUDGE, COURT
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JUDGE - JUDGE, COURT

1 THE COURT: Right.

2 MR. MC AULIFFE: -- we did not tender a bid. We're
3 not approaching this from that perspective, Your Honor,
4 although I do understand that there other individuals and
5 entities who have --

6 THE COURT: Have raised that issue.

7 MR. MC AULIFFE: Correct, Your Honor.

8 THE COURT: But not in respect of your client's
9 interest to buy it; it's really in respect to their interest to
10 buy the --

11 MR. MC AULIFFE: Correct, Judge. They stand on their
12 own --

13 THE COURT: It would -- okay. And, as far as Mr.
14 Poli and Mr. Brown, are they here?

15 MR. SMITH: Yes, Your Honor. My name is Christopher
16 Smith and I represent their interests. They're here; they're
17 ready to answer any questions that you'd like. Their position
18 is they are ready, willing, and able to submit a higher and
19 better bid than the current -- our understanding of what the
20 current bid is of the stalking horse.

21 Additionally, their position is that the -- by your
22 deadline of September 5th that they submitted a bidding package
23 to debtor's counsel complying with all of the conditions except
24 they never did have approval from Pepsi despite -- and they're
25 ready again to give testimony that they sought -- we recently

1 sought it before today's hearing as well in writing and we were
2 turned down.

3 While Pepsi certainly has the right to weigh in on
4 who they think are appropriate bidders, I think that there
5 should be some limit placed on that ability. Here -- the only
6 reason that Mr. Israel gave for turning down my client is
7 suppose -- Mr. Poli is because he has a vending company that
8 delivers a lot of Pepsi products, has done so since at least
9 1980; in fact is one of the ten largest vending -- from what he
10 tells me one of the ten largest vending companies for Pepsi
11 Beverages, and so because of that, they don't typically approve
12 a distributorship for somebody who is also involved in vending.

13 My client has advised me after he was advised of Mr.
14 Israel's declaration that he would be willing to divest himself
15 of that vending business, sell it to another entity so that he
16 could become a qualified bidder and that he has the wherewithal
17 to bid, and particularly whereas here it appears that the
18 stalking horse bidder might be significantly less than both
19 what my client is willing to offer and what the fair value for
20 the route is that I thought that we should be here before Your
21 Honor --

22 THE COURT: What is your client willing to offer?

23 MR. SMITH: Well, so far, we have -- I think the
24 current stalking horse bid as I understand it. There's a five-
25 hundred-thousand-dollar note and another hundred thousand

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1 dollars on the table. My client has on the table at least
2 615,000 which would be -- include the 500,000 on a note plus
3 another 115,000 but he's willing to go up over that and I could
4 caucus with him for a couple of minutes if you need to know a
5 number that's significantly more than that. My understanding
6 is he's willing to go higher and --

7 THE COURT: Okay.

8 MR. SMITH: -- and he has the wherewithal to do so.
9 We posted earnest money of \$60,000 with debtor's counsel back
10 on September 5th when we submitted the bidding package.
11 Debtor's counsel when she didn't schedule the auction -- and
12 understandably so -- returned the check which we've been
13 holding in this office. So it's our understanding that that
14 money should still be in her court.

15 If the Court were to schedule an auction or otherwise
16 qualify Mr. Poli and Mr. Brown to bid, then we would of course
17 return the check and leave the earnest money in place. We're
18 also willing to participate in any due diligence that debtor's
19 counsel or anybody else may need here to ascertain their
20 wherewithal. I've brought some information related to
21 appraisals of my client's residence and the mortgage. We
22 believe there's more than enough equity to go well above the
23 current stalking horse bid.

24 THE COURT: When did your client learn of the reason
25 for being turned down by Pepsi?

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1 MR. SMITH: Well, in writing, we received it -- just
2 recently we received -- when we filed last week, we filed
3 something in writing to Mr. Peter Gorday [ph] and Mr. Israel
4 and he responded in writing the reasons that they would not
5 approve him.

6 He did have -- it's my understanding that he did have
7 some verbal conversations with Pepsi previously and it wasn't
8 clear to him at that -- it was clear to him that he would not
9 be approved but it wasn't clear to him exactly the reason why
10 he would not be approved by Pepsi.

11 THE COURT: And -- okay.

12 MR. SMITH: And it's still not completely --

13 THE COURT: And what is involved in giving up the
14 vending business? What's involved in that? I mean, how hard
15 is that to do? Can it be done promptly? I don't know.

16 MR. SMITH: Yeah. I mean, it depends on who it would
17 have to be transferred to. It's -- from what I understand,
18 it's a thriving vending business that could probably be sold.
19 He could transfer it either to another family member relatively
20 quickly or he could transfer it to a third party and, you know
21 -- I could certainly look into that and get you a better answer
22 to that question if Your Honor needs that.

23 THE COURT: Okay. Why don't you talk to him about
24 what he's prepared to offer.

25 MR. SMITH: All right.

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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JUL 10 2013

1 (Pause.)

2 MR. SMITH: Judge, after caucusing with my clients
3 and this again isn't written in stone, it's subject to even
4 further inquiries but they're willing to increase from 615
5 another \$50,000 so we can make it 665.

6 Now, I would also mention, Judge, that Mr. Brown was
7 previously approved by Pepsi for the purchase of -- I have a
8 letter that's dated June 12th, 2013.

9 THE COURT: So --

10 MR. SMITH: He was with another partner --

11 THE COURT: So are they working together, Mr. Poli
12 and Mr. Brown?

13 MR. SMITH: If they were successful in bidding on a
14 distributorship, then the understanding is -- because Mr. Brown
15 has significant experience in running the route, driving the
16 route so he would be involved in logistics, operations, and
17 continuing that process. And Mr. Poli would be providing the
18 financing and other administrative tasks necessary to run the
19 distributorship.

20 THE COURT: Okay.

21 MR. SMITH: And that number again is not written in
22 stone.

23 THE COURT: Right.

24 MR. SMITH: We just added 50,000 --

25 THE COURT: Right.

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BY THE CLERK OF COURT
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1 MR. SMITH: -- because it's a round number.

2 THE COURT: Right. Okay. All right. Is anyone here
3 for -- from Pepsi?

4 MR. WALDMAN: Yes, Your Honor. Thomas Waldman,
5 Greenbaum, Rowe, Smith & Davis.

6 THE COURT: Is Mr. Israel here?

7 MR. WALDMAN: Mr. Israel is not here today.

8 THE COURT: Okay.

9 MR. WALDMAN: My understanding, Your Honor, first of
10 all with respect to Mr. Brown as is set forth in Mr. Israel's
11 declaration, Mr. Brown's approval was in connection with a
12 totally different transaction. In fact --

13 THE COURT: No, I understand Mr. Brown. He --

14 MR. WALDMAN: Yeah --

15 THE COURT: -- he's really tied into Mr. Poli as far
16 as --

17 MR. WALDMAN: With Mr. Poli --

18 THE COURT: -- his transactions. Sorry.

19 MR. WALDMAN: -- the concern is that Mr. Poli's
20 vending machines are in territories far and wide, and if Mr.
21 Poli is a distributor -- Mr. Poli's vending business purchases
22 from distributors. The distributorship arrangement is based on
23 exclusive territories. There are sound business reasons why
24 Mr. Poli was not --

25 THE COURT: I agree with that --

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1 MR. WALDMAN: -- and --

2 THE COURT: -- although he's now saying he will get
3 out of that business.

4 MR. WALDMAN: Well, he's saying he'll get out of the
5 business and sell it to family member or to a third party. Who
6 knows if that's a legitimate sale or a sale to a straw person -

7 -

8 THE COURT: Well, it's to a third party I'm assuming.
9 Does Pepsi need to approve that business or that transfer?

10 MR. WALDMAN: I don't know, Your Honor. I don't
11 believe so.

12 THE COURT: When did Pepsi give Mr. Poli the actual
13 reason for --

14 MR. WALDMAN: Well, it was given in writing as Mr.
15 Smith said at the end of last week, but Mr. Poli had not
16 submitted a written application until last week. My
17 understanding is that there were telephone conversations during
18 the period when bids were being accepted and Mr. Poli was told
19 that he would not be approved.

20 THE COURT: But not why.

21 MR. WALDMAN: I don't know whether the reason was
22 given, Your Honor. I don't believe he was ever told
23 specifically why. Also we've had great difficulty getting an
24 audience from Pepsi to even discuss that.

25 MR. SMITH: Judge, I would just point out that with

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1 respect to Mr. Brown he was approved for the purchase of the
2 Buhre Beverage --

3 THE COURT: No, I -- the point that's -- it's a
4 legitimate point that Pepsi is making is that it appears to me
5 and I think to Pepsi that Mr. Brown while a -- an experienced
6 driver and someone who understands this business is not the
7 money behind the deal, is not the ultimate administrative party
8 behind the deal, and therefore, that person is important and
9 here it's Mr. Poli, and if Mr. Poli continued on as the
10 principal of the vending machine business, then it seems to me
11 a deal with Mr. Poli which Mr. Brown is associated with is --
12 you know, is perfectly fine for Pepsi to reject.

13 MR. SMITH: Well, but Mr. Brown is certainly an
14 integral part of this deal. He signed --

15 THE COURT: Well, I know but that's -- but the --
16 when you say this deal, it's the deal with Mr. Poli. So the
17 conflict issues are present there. Mr. Brown isn't offering to
18 buy it separate and apart from Mr. Poli, right?

19 MR. SMITH: Well, we discussed that.

20 THE COURT: Well, but he -- if he was, he would have
21 made an offer. I mean --

22 MR. SMITH: Well, he did make an offer with -- in
23 conjunction with Mr. Poli.

24 MR. SMITH: But I mean, he would have made a separate
25 offer where he would buy the business as opposed to working

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1 -- you know, to any purchaser.

2 THE COURT: Right.

3 MR. WALDMAN: I don't think I understand Your Honor's
4 question.

5 THE COURT: Is Mr. Cappelli providing any separate
6 consideration to Pepsi?

7 MR. WALDMAN: No, Your Honor.

8 THE COURT: Okay.

9 MR. WALDMAN: I mean, there's a question about
10 whether -- I think there's an issue about how the cure
11 provision is interpreted, whether the cure comes from sale
12 proceeds or whether the cure comes from the purchaser above and
13 beyond sale proceeds.

14 THE COURT: Right.

15 MR. WALDMAN: And I think that Your Honor's -- Your
16 Honor's bid procedures order insofar as it required Mr. Sanchez
17 to post a bond for the full purchase price plus the cure
18 indicates that Your Honor considers the cure provision would
19 come directly from the purchaser above and beyond the purchase
20 price.

21 THE COURT: Right. And is that --

22 MR. WALDMAN: So, in that respect --

23 THE COURT: Is that Mr. Cappelli's bid?

24 MR. WALDMAN: Mr. Cappelli is represented here today.

25 THE COURT: Okay.

1. What is the purpose of the study?
 2. What are the research objectives?
 3. What is the research methodology?
 4. What are the results of the study?
 5. What are the conclusions of the study?

1 MR. FAGA: Respectfully, Your Honor, Kevin Faga for
2 Mr. Cappelli.

3 Our understanding is that the Court's order indicates
4 that the cure money to Pepsi has to be paid from the closing
5 table. The money at the closing table is the purchase price,
6 and as long as Pepsi is satisfied, that is a -- that's
7 currently a debt that's owed to Pepsi by the debtor.

8 So, from these assets, in order for the debtor to
9 sell the assets to Mr. Cappelli or to anyone, the debtor has to
10 ensure that these debts -- that these assets transfer free and
11 clear of all encumbrances. As such, it has to satisfy its
12 franchise agreement with Pepsi so Pepsi will be made whole. We
13 submit it should be made whole from the purchase price because
14 again, it's the debtor's obligation to Pepsi.

15 THE COURT: Well --

16 MR. WALDMAN: Except, Your Honor, that --

17 THE COURT: -- is Pepsi -- is the way this would be
18 documented Pepsi accepting on consent an assignment of the
19 distribution agreement or is there a new distribution agreement
20 that's --

21 MR. WALDMAN: I believe what happens, Your Honor, is
22 that a new distribution agreement is entered into.

23 THE COURT: And has that happened?

24 MR. WALDMAN: Has it happened? No. If I may, Your
25 Honor, Mr. Cappelli was given an approval letter by Pepsi --

APPROVAL LETTER
TO THE COURT
FROM THE DEBTOR
DATE: 10/1/00
BY: [Signature]
FOR: [Signature]

1 THE COURT: Right.

2 MR. WALDMAN: -- as part of the process prior to Mr.
3 Cappelli submitting the stalking horse bid, and the approval
4 letter specifically conditioned approval on the cure.

5 THE COURT: Right. Okay.

6 MR. WALDMAN: Actually, you know what, from a
7 practical standpoint, I don't think Pepsi cares whether it's
8 paid out of the sale proceeds or out of the separate -- out of
9 a -- you know, a payment made above and beyond the sale
10 proceeds.

11 THE COURT: What is Pepsi's cure?

12 MR. WALDMAN: Pepsi's cure is the thirty-six-
13 thousand-dollar administrative claim that it has filed and all
14 of its attorney's fees incurred in connection with both the
15 Sanchez adversary proceeding and this proceeding.

16 THE COURT: Okay. Maybe I'm wrong. My understanding
17 is that the debtor really hasn't been engaged in business for a
18 while. Is that correct?

19 MS. PENACHIO: Yes, Your Honor, that is correct.
20 Shortly after the filing, Pepsi -- there were some checks that
21 were dishonored. Pepsi exercised its right to take over the
22 route. Mr. Sapra, Bhaveen Sapra, the principal of the debtor
23 did not oppose that Pepsi would run the route and has been
24 cooperating with Pepsi to --

25 THE COURT: So Pepsi has been running the route.

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JULIA M. HARRIS, CLERK
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
JUL 15 2014

1 MS. PENACHIO: Pepsi has been running the route.

2 THE COURT: Okay.

3 MS. PENACHIO: So --

4 THE COURT: All right.

5 MS. PENACHIO: -- you know --

6 THE COURT: I --

7 MR. SMITH: Your Honor, I'm sorry to interrupt but
8 there's one other thing just for policy considerations, it's --
9 I think it's in the debtor's best interest to have at least a
10 process where --

11 THE COURT: I agree.

12 MR. SMITH: -- and you could address the vending
13 issue if you establish new bidding procedures and --

14 THE COURT: Well --

15 MR. SMITH: -- because of the time that's elapsed you
16 may want to put that on the short leash but by establishing new
17 bidding procedures seeing if my client can qualify --

18 THE COURT: I don't need to establish new bidding
19 procedures but I do believe that there should be some extra
20 time for Pepsi and Mr. Poli to talk about the potential for a
21 satisfactory resolution of the impediments to Pepsi granting an
22 approval.

23 MS. PENACHIO: Your Honor, may I be heard on that
24 point? Mr. Poli contacted me back in early September.

25 THE COURT: Right.

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1 MS. PENACHIO: I was very, very accommodating. I
2 promptly sent him information. I spoke to his attorney --

3 THE COURT: It's not -- the only --

4 MS. PENACHIO: He didn't do anything for months.

5 THE COURT: No, no, he --

6 MS. PENACHIO: And --

7 THE COURT: I think the issue -- Pepsi told him they
8 weren't going to take him. Okay? And --

9 MS. PENACHIO: Right. But he waited a month before
10 submitting an application, two months --

11 THE COURT: Fine. But Pepsi just told him the reason
12 a few days ago. And if there's a potential here to get an
13 auction going, it's to everyone's interest.

14 MS. PENACHIO: Absolutely.

15 THE COURT: And I don't see who's being hurt in the
16 meantime.

17 MS. PENACHIO: I agree with that; it's just very
18 frustrating because -- on both ends because I think Mr. Poli
19 should have promptly submitted a written application instead of
20 waiting for two months.

21 THE COURT: Well, I --

22 MR. FAGA: Respectfully, Your Honor, on behalf of the
23 -- of Mr. Cappelli, Mr. Poli says he just got an answer last
24 week. He just submitted an application last week. Had he
25 followed the bidding procedures and submitted an application at

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1 least, then I could see him coming in and saying, Judge, I need
2 more time, we're trying to work it out with Pepsi.

3 MR. SMITH: He's been trying to get --

4 MR. FAGA: He didn't even do that.

5 MR. SMITH: He's been trying to get an audience with
6 Pepsi for months.

7 THE COURT: I don't --

8 MR. SMITH: I've been trying to get an audience with
9 Pepsi.

10 THE COURT: I don't know if the application has a
11 line for -- or the response says, you know, you have to give a
12 reason. As far as I can find for today --

13 MR. WALDMAN: I don't believe it does, Your Honor --

14 THE COURT: Right.

15 MR. WALDMAN: -- and frankly --

16 THE COURT: I need a reason and it hasn't been given
17 until recently and Mr. Poli has given a -- I believe a good
18 faith response to it which is he's willing to divest his
19 business. So I think that Pepsi should speak with him
20 promptly. I don't want to delay this too long but on the other
21 hand the route is being run by Pepsi so I don't think Pepsi is
22 hurt by the delay.

23 MR. SMITH: Well, Your Honor --

24 THE COURT: And Pepsi is right. I mean, it obviously
25 -- it has two goals here. One is to get its cure claim paid,

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18 MS. PENACHIO: Very well, Your Honor. So I will
19 circulate a proposed order that -- should I make a new auction
20 date or --

23 MS. PENACHIO: Okay.

1. What is the purpose of the document?
 2. What are the main findings of the study?
 3. What are the implications of the findings?
 4. What are the limitations of the study?
 5. What are the conclusions of the study?

1 do it before a month but the auction would be a day or two
2 before then if Pepsi provides consent to Mr. Poli which would
3 be, you know, a week before then if they do it one way or
4 another.

5 MS. PENACHIO: Very well, Your Honor. And the debtor
6 welcomes a bidding process. It's just frustrated that --

7 THE COURT: Okay.

8 MS. PENACHIO: -- it didn't happen in September.

9 THE COURT: Right.

10 MR. WALDMAN: And, obviously, Your Honor, from
11 Pepsi's perspective, we don't -- we feel as though we've been
12 through a bidding process --

13 THE COURT: I don't.

14 MR. WALDMAN: -- so Pepsi has very patient --

15 THE COURT: You know what? It could have given him
16 the reason since he said he's willing to adjust his whole
17 business based on the reason that was given. And it may just
18 want the guy.

19 MR. WALDMAN: I'm sorry, Your Honor?

20 THE COURT: And they may just want the guy. You
21 know, if it truly is just the conflict and he says I'm prepared
22 to deal with the conflict and he has the driver in his deal,
23 maybe they would have.

24 MR. WALDMAN: I suppose that's possible, Your Honor.

25 THE COURT: Well, I hope it is.

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1 MR. WALDMAN: In the interim --

2 THE COURT: And I hope it isn't just because they
3 like someone else for whatever reason. You know, I will want
4 to hear Mr. Israel as to whether there's any, any notion of any
5 inside deal here. All right? On the record. He submitted a
6 declaration and he's not here, and that's the other reason I'm
7 adjourning this.

8 These franchise-type situations can get very ugly
9 very fast. Witness the Dunkin Donuts case that began the
10 calendar today. I think it was in litigation for about five
11 years. So I think Pepsi wants its T's crossed and I's dotted
12 on this.

13 Okay? So, on the other objection, Mr. McAuliffe, as
14 you say it -- the basis for your objection is really the
15 debtor's reliance on 363(f) (4)

16 MR. MC AULIFFE: Correct, Your Honor.

17 THE COURT: So we can turn to that now because you
18 have your summary judgment motion on.

19 MR. MC AULIFFE: Yes, sir.

20 THE COURT: I will say that there will -- and I'm
21 holding off Pepsi's motion for a stay because if I conclude
22 that your client essentially has a veto here, then in all
23 likelihood I would lift the stay but I want to hear the summary
24 judgment motion first.

25 MR. MC AULIFFE: Thank you. Judge, I think this has

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1 been fairly extensively briefed by both Mr. Sanchez and we've
2 received opposition from the debtor.

3 THE COURT: Right.

4 MR. MC AULIFFE: If I can summarize what we believe
5 are the key points. We are seeking to have Your Honor reform
6 the transfer documents related to the sale of the Buhre
7 Distribution route as well as certain property items consisting
8 of two trucks that have been used in connection with servicing
9 the route.

10 The case law that we have cited in our memorandum --

11 THE COURT: Well, you're looking for more than that.
12 You're also looking to have relief under UCC -- let me try to
13 find the right section here -- UCC 9-506(a) saying that the UCC
14 one that was filed contained only minor errors or omissions and
15 that the UCC is not seriously misleading --

16 MR. MC AULIFFE: Correct, Judge. And, in fact, there
17 were two UCC filings; there was the initial UCC-1 filed and
18 then there was an amendment filed prior to the filing date.

19 THE COURT: Right.

20 MR. MC AULIFFE: Attempting to correct it. I don't
21 believe it fully accomplished that.

22 THE COURT: Right.

23 MR. MC AULIFFE: And that was performed by my
24 client's predecessor counsel --

25 THE COURT: Right.

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1 MR. MC AULIFFE: -- who was involved with the
2 transaction.

3 Judge, we think that the intent of the parties can be
4 gleaned from the record before you. I think that the debtor
5 has acknowledged there was mistake involving the transfer
6 documents. I believe the debtor has also acknowledged that my
7 client was indeed intended to be a secured creditor with regard
8 to the assets being transferred.

9 THE COURT: I don't think they have acknowledged
10 that.

11 MR. MC AULIFFE: I'm sorry. I believe they've
12 acknowledged that we're entitled to be a secured creditor. I
13 think their position is, Judge, that the -- which I believe is
14 not a credible position is that the Buhre Distribution route
15 was not intended to be included in the collateral. We think
16 that that position is not credible --

17 THE COURT: Well, the agreements and the UCC -- and
18 the amended UCC-1 all say that what secures the obligation is
19 the distribution agreement by and between Bruckner Beverage and
20 Pepsi which in essence is a future agreement, right?

21 MR. MC AULIFFE: Correct, Judge. It was in artfully
22 drafted.

23 THE COURT: Well, that's pretty specific.

24 MR. MC AULIFFE: But we're -- I think there can be no
25 rational dispute that the asset means almost a Buhre route.

1 THE COURT: Well, can I --

2 MR. MC AULIFFE: And the truck --

3 THE COURT: You say it's absurd to provide for that
4 type of collateral but isn't at least arguably equally absurd
5 to agree to pay \$900,000 for something where you need Pepsi's
6 approval and you don't have it yet?

7 MR. MC AULIFFE: Well, I believe there was an
8 approval letter. That's the June 2013 approval letter issued
9 to Mr. Sapra and to Mr. Brown. Now, Pepsi has argued that that
10 is not the same transaction which was memorialized by that July
11 31st transaction --

12 THE COURT: Right.

13 MR. MC AULIFFE: -- but it essentially is the same
14 transaction. They -- Mr. Brown is known to Pepsi. Mr. Brown
15 is a driver. Mr. Brown I believe is still driving for other
16 distributors at that location. Again, Judge, we think it's --
17 I think the intent of the parties can be gleaned from the
18 evidence. I understand that there is a dispute that has been
19 interposed with -- in connection with what the collateral was
20 but I think it's been admitted in the affidavit -- the
21 affirmation, Your Honor, from Mr. Sapra as well as their
22 counter 7056 statement and memo of law that they do acknowledge
23 that there was intended to be a secured transaction here.
24 Inartfully drafted, we all know that.

25 THE COURT: Well, the issue though is secured by

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1 what? I mean, I don't -- maybe I'm wrong. Looking at the Rule
2 7056 statement or more aptly counter statement, I think that
3 they don't admit that or the debtor and Mr. Sapra never did.

4 They admit that -- who the purchaser was and who the
5 seller was, was backwards or incorrect. They're very clear on
6 that. So we're really just talking about the collateral and,
7 you know, he says the UCC was correct for example, on Page 11,
8 Paragraph 28, again in Paragraph 31, in his affidavit,
9 Paragraph 30.

10 MR. MC AULIFFE: Judge, I acknowledge their counter
11 --

12 THE COURT: Put it differently, if you can't sell the
13 route unless you have Pepsi's approval, how could he grant a
14 lien on it? He could only grant a lien on the future deal.

15 MR. MC AULIFFE: I think they were basing it upon the
16 July 2013 approval letter but that evidenced Pepsi's --

17 THE COURT: But I think that -- isn't that a factual
18 issue on whether Pepsi had actually signed off on this deal? I
19 mean, otherwise, he wouldn't have it to pledge.

20 MR. MC AULIFFE: Judge, my understanding is Pepsi did
21 not have a problem with this transaction until this case was
22 filed.

23 THE COURT: Well --

24 THE COURT: Because it's not been articulated to me.

25 THE COURT: But --

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1 MR. MC AULIFFE: I've never seen any evidence of
2 their questioning the transaction that took place. Again, this
3 filing was precipitated by my client's scheduling a UCC sale by
4 his predecessor counsel and then there was the filing. And
5 then Your Honor may recall the debtor brought on an order to
6 show cause to punish my client for violating the automatic stay
7 for purportedly operating the route and interfering.

8 My client was present that day. We filed opposition,
9 and if you recall, Your Honor, my client took the stand and he
10 was determined to be credible --

11 THE COURT: Right.

12 MR. MC AULIFFE: -- with regard to his statements and
13 averments. I believe he has credibility. I would also counter
14 by saying that the debtor's principal does not have
15 credibility.

16 THE COURT: Well, but let me just -- I mean, just on
17 the 7056 statement, Paragraph 24 of Mr. Sanchez's 7056
18 statement says that:

19 "At the July 31st meeting the parties confirmed the
20 terms of the transfer of the shares of Buhre from Sanchez to
21 Bruckner, the agreed-upon transaction."

22 And it lists, you know, that Sanchez would transfer a
23 hundred percent of the shares to Buhre -- in Buhre to Bruckner
24 for the sum of 1,150,000 payable as he sets forth there.
25 Sanchez would receive two promissory notes from Bruckner, again

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1 reflecting the consideration. Sanchez would receive a security
2 interest in the shares of Buhre and all of its tangible and
3 intangible assets including the Buhre Pepsi route which was
4 initially held under the distributor agreement between Buhre
5 and Pepsi and would later be held under the distributor
6 agreement between Bruckner and Pepsi once B. Sapra was able to
7 obtain same. So he hadn't gotten it yet, and then D says
8 Sanchez would retain one share of stock in Buhre until such
9 time as Bruckner obtained its distributor agreement with Pepsi.

10 So I mean under his 7056 statement, it's clear that
11 they hadn't gotten the agreement yet.

12 MR. MC AULIFFE: Actually, Your Honor, I -- with all
13 due respect, I'm referring to that letter and this is also
14 annexed to Mr. Poli's declaration. This is the June 12th, 2013
15 Pepsi -- it's a conditional approval letter and Your Honor has
16 seen -- I have an extra copy I can pass up if it's helpful but
17 it says:

18 "We are happy to inform you that your request for the
19 purchase of Buhre Beverage Distributor, Inc. has been approved.
20 Final approval is based upon the update on your" -- and says
21 paren -- "Bhaveen Sapra green card status and details on
22 allowances and restrictions attached to this green card."

23 We would submit there was a conditional approval, the
24 parties relied upon it, and then closed the transaction.
25 Unfortunately, the transfer documents were completely in error.

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1 Remarkably in error and --

2 THE COURT: Well --

3 MR. MC AULIFFE: -- I know we have a -- you know, in
4 a normal bankruptcy context, Judge, it's difficult to use
5 reformation to create a security interest that's not properly
6 recorded. I would submit that these facts of this case would
7 allow Your Honor to reform the transfer documents.

8 To the extent that Your Honor believes that there may
9 be at least one issue of material fact that's in dispute, we're
10 prepared to endeavor to do some discovery very quickly on that,
11 come back, have an evidentiary hearing if necessary. Again, we
12 only received the debtor's opposition papers midweek last week.
13 Our motion had been teed up in early September. So we moved
14 quickly in preparing our reply. Frankly, from my personal
15 perspective, I thought that the debtor's contention regarding
16 the Buhre route not being included in the collateral was really
17 on its face not a very credible statement.

18 THE COURT: But isn't it the case that if a
19 distributor has a hundred or ninety-nine percent change in
20 ownership from Mr. X to Mr. Y that Pepsi has to approve Mr. Y
21 before the route is still affected. Don't they have that --

22 MR. MC AULIFFE: I believe so, Judge, and I think
23 that happened and it was memorialized by this letter --

24 THE COURT: But --

25 MR. MC AULIFFE: -- which is again a conditional

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1 approval letter. I think its face --

2 THE COURT: But --

3 MR. MC AULIFFE: It says approved.

4 THE COURT: -- it wasn't -- but that was the first
5 one, right? That was the first --

6 MR. MC AULIFFE: No, no, no, Judge. No, the first
7 transaction occurred in December of 2012. Never happened.
8 This was June of -- June 12th, 2013. That's the Pepsi
9 conditional approval letter and then the second transaction
10 occurred July 31st, 2013. So the second transaction occurred
11 in reliance of this Pepsi approval letter which again it says
12 in the first sentence:

13 "We are happy to inform you that your request for the
14 purchase of Buhre Beverage...has been approved."

15 THE COURT: But it --

16 MR. MC AULIFFE: Subject to conditions thereafter to
17 be satisfied. That was the conditions referenced with the
18 transfer documents. Again, Your Honor, it was inartfully
19 drafted by my predecessor but if we could just consider the
20 extreme prejudice to my client --

21 THE COURT: But if you have a conditional approval
22 that hasn't happened yet how can they really grant the lien?

23 MR. MC AULIFFE: Well, Judge, perhaps I'll need to do
24 some discovery of Pepsi and find out how they traditionally and
25 in other situations have approved transactions. I don't know

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1 if they're deviating from a prior procedure in place. I don't
2 know if they're acting --

3 THE COURT: Well, I don't know if it's really Pepsi
4 or the parties' understanding. I mean, one of the limits on
5 reformation under New York law is where the parties contract
6 based on uncertain or contingent events. There are
7 contingencies or conditions in that -- you know, in that
8 approval.

9 MR. MC AULIFFE: Judge --

10 THE COURT: And, you know, I --

11 MR. MC AULIFFE: -- I would submit many of these
12 contingencies are -- again, looking on Page 2 of the Pepsi
13 approval letter, "secure your Class 3 license, make
14 arrangements for proper uniforms, deposit 53,000 in your
15 corporate checking account, continue to ride the route." This
16 letter memorializes --

17 THE COURT: According to Mr. Sanchez, they didn't do
18 any of that. They didn't know how to do it.

19 MR. MC AULIFFE: Mr. Sapra?

20 THE COURT: Yeah.

21 MR. MC AULIFFE: Mr. Sapra -- it's my understanding
22 Mr. Sapra did not work the route as diligently as he could have
23 and --

24 THE COURT: Did he ever get the license?

25 MR. MC AULIFFE: I'm not sure, Judge.

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1 THE COURT: Did he ever post the 56,000?

2 MR. MC AULIFFE: As I sit here right now, I'm not
3 sure, Judge.

4 THE COURT: I mean, I --

5 MS. PENACHIO: Your Honor, if I may, it may -- this
6 whole transaction is absurd including selling the route to a
7 twenty-four-year old who didn't have a green card who had no
8 experience --

9 THE COURT: Well --

10 MS. PENACHIO: -- and including giving \$100,000 in
11 cash to Mr. Sanchez at two different banks, meeting him in
12 Greenwich and handing him 30,000 in cash and meeting him in the
13 Bronx. I just -- I need discovery. I don't -- and I don't
14 know what happened.

15 THE COURT: Well, to me, the main issue is you both -
16 - I mean, as I said earlier, it would be -- it's argued by Mr.
17 McAuliffe that it's absurd for Mr. Sanchez to turn over his
18 business to Mr. Sapra and his son without having a lien on the
19 business including the most important asset which is the route.

20 On the other hand, Mr. Sapra argues with some
21 credibility that it would be absurd for him to agree to pay
22 over a million dollars for a business where he doesn't
23 ultimately he can run it because Pepsi hasn't actually signed
24 off on the dotted line on its consent.

25 Also, ameliorating Mr. Sanchez's argument is the fact

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20 And I think it's a real stretch to say that listing
21 the distribution agreement as the one between Bruckner and
22 Pepsi as opposed to the one between Buhre and Pepsi or some
23 other agreement -- you know, for example, I could certainly see
24 them assigning the -- whatever rights are under that interim --
25 or initial consent but I have real doubts that a third party

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1 wouldn't be seriously misled by the UCC-1 and the UCC-3 as to
2 who -- as to what the collateral is.

3 Because, again, there's this underlying issue as to
4 what it was that Buhre as owned by Sapra could assign. I just
5 don't know how you could assign something that isn't yours.

6 MR. MC AULIFFE: Your Honor, this may lead us to an
7 existential question. If this transfer which we believe --
8 which we're seeking to reform did not occur and was not
9 effective, it wasn't transferred, does my client still own it?

10 THE COURT: Well, there was a transfer. It's just --
11 you're just basically saying that I should assume that what was
12 meant by the transfer is different than what the documents say.

13 MR. MC AULIFFE: Which is exactly why we're relying
14 on reformation, Judge.

15 THE COURT: Well, I know you're relying on it but
16 it's a difficult standard.

17 MR. MC AULIFFE: I acknowledge that --

18 THE COURT: I mean, it's a clear and convincing proof
19 standard, and I think you're basically ultimately relying on an
20 argument that it would be absurd to hold otherwise and I can
21 certainly see an alternative argument there, and the debtor
22 submitted an affidavit that says, yeah, we didn't think that
23 you were assigning the Buhre route.

24 MR. MC AULIFFE: We could do discovery; we'll find
25 out if Mr. Sapra ever had any other interest in another Pepsi

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1 route and I would doubt that he does --

2 THE COURT: Well, no, no, he would have a future
3 interest in the Bruckner route, and to me it's logical that
4 that's what he would assign, my future interest in it if I get
5 one because otherwise why am I paying over a million dollars
6 for something I can get kicked out of the next day if Pepsi
7 sees, you know, that there's been a transfer.

8 Now, you may say that Pepsi knew all about it and
9 everyone knew about it and -- but I think that's a matter for
10 evidence.

11 MR. MC AULIFFE: And I totally understand, Your
12 Honor, and I think we will need discovery on Pepsi's knowledge
13 --

14 THE COURT: Well, maybe --

15 MR. MC AULIFFE: -- and when --

16 THE COURT: Maybe so.

17 MR. MC AULIFFE: -- they learned about the
18 transaction.

19 THE COURT: Or -- well -- yeah, although I think
20 ultimately it's the two parties to the transaction's knowledge
21 really. I mean, your client basically said this is clear. It
22 was meant to be an assignment of Buhre and so we'll see what
23 Mr. Sapra and your client say under oath on that issue.

24 MR. MC AULIFFE: Yes, sir.

25 THE COURT: Okay. So I am going to deny the motion

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1 for summary judgment which seeks reformation of various
2 transaction documents but only insofar as the motion seeks
3 reformation of the transaction documents describing the
4 collateral for the sale transaction. Because otherwise I
5 believe that the defendant -- the only remaining defendant has
6 acknowledged that the -- that otherwise the documents were
7 mistaken in describing the buyer and the seller inaccurately.

8 So, just to be clear, the portion of the motion that
9 I'm denying is that portion that seeks to reform the
10 description of the collateral in the transaction documents as
11 well as seeks a declaration that -- the description of that
12 collateral in UCC-1 and UCC-3 that were filed satisfies UCC 9-
13 506(a) in that it contains -- or they contain only minor errors
14 or omissions that do not make the financing statement seriously
15 misleading.

16 The parties accurately set forth the standard for
17 summary judgment under Bankruptcy Rule 7056 which incorporates
18 Federal Rule of Civil Procedure 56.

19 "Summary judgment shall be granted if the pleadings,
20 depositions, answers to interrogatories, and
21 admissions on file together with affidavits, if any,
22 show that there's no genuine issue as to any material
23 fact and that the moving party is entitled to
24 judgment as a matter of law." See Celotex Corp. v.
25 Catrett at 477 U.S. 317, 322 (1986).

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1 In deciding the motion therefore, I must determine if
 2 there are any material factual issues to be tried while at the
 3 same time since the non-moving party would be precluded from a
 4 trial if the relief were granted resolving ambiguities and
 5 drawing reasonable inferences against the moving party. Knight
 6 v. U.S. Fire Insurance Company, 804 F.2d 9, 11 (2nd. Cir.
 7 1986).

8 The burden therefore rests on the moving party to
 9 establish the absence of a genuine issue as to any material
 10 facts. Celotex, 477 U.S. 322, 323.

11 While the courts have held that the mere existence of
 12 a scintilla of evidence in support of a non-moving position
 13 would be insufficient and that there must be evidence on which
 14 a jury could reasonably find for the non-moving party and that
 15 the non-moving party may not defeat a summary judgment motion
 16 by relying on self-serving or conclusory statements and that
 17 there must be something more than some metaphysical doubt as to
 18 material facts. See generally Anderson v. Liberty Lobby, Inc.,
 19 477 U.S. 242, 247-48 (1986) and Matsushita v. Zenith Radio
 20 Corp., 475 U.S. 574, 586 (1986).

21 Once evidence of a material disputed fact has been
 22 submitted in support of an objection to a summary judgment
 23 motion, the Court although that evidence need not be probative
 24 must move on to the trial stage and deny the motion for summary
 25 judgment as long as that evidence raises a reasonable inference

14 Given that heavy burden, most courts in New York have
15 acquired a showing of mutual mistake that would contradict the
16 terms of the parties' agreements by clear and convincing
17 evidence. Westinghouse Electric Corp. v. New York City Transit
18 Authority, 735 F.Supp. 1205, 1218 (S.D.N.Y. 1980). And Seebold
19 v. Halmar Construction Corp., 146 A.D. 2d 886, 886 (Third Dept.
20 1989).

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1 parties were not sophisticated. The presence of contradictory
 2 terms in an unreformed contract may also support a reformation
 3 claim. Winmar Co. v. Teachers Insurance and Annuity
 4 Association of America, 870 F.Supp. 524, 535-36 (S.D.N.Y.
 5 1994). And the parties' course of performance or subsequent
 6 behavior also may indicate their true intentions including the
 7 ultimate result which would be a mutually agreed correction
 8 after the fact. See Gulf Insurance Company v. Transatlantic
 9 Reinsurance Company, 69 A.D. 3d 71, 85 (1st Dept. 2009) and
 10 Henderson v. U.S. Postal Service, 1996 W.L. 662624 (W.D.N.Y.
 11 October 31, 1996).

12 Here, the key dispute is over whether a
 13 distributorship agreement which gave Buhre Beverage, the
 14 debtor, a exclusive route to deliver Pepsi products was
 15 assigned for security purposes to the plaintiff, Mr. Sanchez
 16 under the July 2013 transaction.

17 The document is consistent in describing the
 18 agreement that was assigned is not an assigned agreement
 19 between Buhre Beverage and Pepsi but rather an agreement
 20 between the prospective buyer, Bruckner Beverage Inc. -- or
 21 ultimate buyer and Pepsi which never came into effect. That
 22 was also what was reflected in the UCC-1 that was filed as well
 23 as the UCC-3 that was filed ostensibly to correct the parties'
 24 error.

25 The parties' Rule 7056 statements and their

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1 respective affidavits or declarations dispute this very factual
 2 issue; i.e., was it intended by the parties that the
 3 prospective Bruckner Pepsi distribution agreement be assigned
 4 or alternatively as Mr. Sanchez contends the existing Buhre
 5 Beverage Pepsi agreement.

6 I conclude based on the record before me for purposes
 7 of this summary judgment motion that factual dispute is
 8 material and cannot be decided based on the materials that I
 9 need to take into account for a summary judgment motion. It's
 10 argued that it would be absurd to have sold the business or
 11 ninety-nine percent of the business to Messrs. -- to Mr. Sapra
 12 and ultimately to Bruckner without getting an assignment back
 13 of the business's route but drawing as I must reasonable
 14 inferences in favor of the non-moving party, I do not believe
 15 it is so clearly absurd, particularly given that if Sapra and
 16 Bruckner did not in fact have that agreement with Pepsi their
 17 money would be -- their purchase that is would be wasted.

18 So I conclude that I cannot on a summary judgment
 19 motion enter an order reforming the agreement to reflect the
 20 collateral that the plaintiff believes was -- or should have
 21 been pledged to him.

22 I also conclude that the UCC-1 and UCC-3 as filed at
 23 least for purposes of Mr. Sanchez's summary judgment motion
 24 cannot be said to contain only minor errors or omissions that
 25 would not render the statements seriously misleading. The name

TO: HON. JUDGE J. L. ROBERTS
 FROM: JAMES J. ROBERTS
 RE: UCC-1 AND UCC-3
 JAMES J. ROBERTS
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of the route -- I'm sorry, the name of the contract under which the route was assigned is not a matter of a typo or a transposition. Bruckner is very different from Buhre Beverage and I believe third parties quite arguably therefore would be seriously misled by both the UCC-1 and the UCC-3. See In Re: Sterling United, Inc., 2014 W.L. 49669 -- I'm sorry, 4966293 at Page 4 (Bankruptcy W.D.N.Y. October 3, 2014), and In Re: Soft Talk Publishing Company, Inc., 856 F.2d 13281332 [sic] (9th Cir. 1988) as well as ProGrowth Bank, Inc. v. Wells Fargo Bank, N.A., 558 F.3d 809, 812-813 (8th Cir. 2009).

So I'll enter an order denying the motion and the parties should meet and confer on a discovery schedule.

Given that result, I conclude that I should overrule Mr. Sanchez's objection to the sale. Clearly, his asserted security interest in the primary asset to be sold here the right to assume and assign a distributorship agreement is subject to bonafide dispute under Section 363(f)(4) of the Bankruptcy Code.

I had serious doubts whether given the colloquy at the beginning of this hearing the sale price does clearly reflect the fair value of the assets to be sold, and therefore, I was uncomfortable ruling on the objection under Section 363(f)(3). See In Re: Boston Generating, LLC, 440 B.R. 302, 332 (Bankr. S.D.N.Y. 2010).

And I trust that I'll have a clearer record on that

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
CLERK OF COURT
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JULY 1, 2014

1 at the adjourned hearing but that would only be an alternative
2 basis for denying the objection, that separate basis being
3 363(f)(4).

4 So, to be clear, the only two possible prospective
5 bidders here if in fact Pepsi determines in the exercise of its
6 reasonable judgment to withhold its approval of Mr. Poli would
7 be Mr. Poli and the stalking horse bidder. I'm not reopening
8 the auction generally but I do believe that there has been
9 sufficient lack of clarity as to the basis for Pepsi's denial
10 of approval as well as insufficient time to review Mr. Poli's
11 proposal to cure the problem that Pepsi identified last week
12 that would warrant extending the potential for an auction here
13 until that process plays out.

14 And so I would like the debtor to submit an order
15 just laying out the time table there after you get a date from
16 Ms. Lee.

17 MS. PENACHIO: Yes, Your Honor, and I would just like
18 to point out one minor -- albeit minor point. There is a small
19 carve out for Mr. Cappelli. So if -- and that carve out --

20 THE COURT: You mean a breakup fee --

21 MS. PENACHIO: A break --

22 THE COURT: Yeah.

23 MS. PENACHIO: -- I'm sorry, a breakup fee. So it's
24 -- you know --

25 THE COURT: Right.

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1 MS. PENACHIO: -- he's hung in there. I don't --
2 that -- if he doesn't win, it's a small breakup fee but it will
3 cover his expenses. So it's --

4 THE COURT: Right.

5 MS. PENACHIO: -- you know, everyone is a winner if
6 there is an auction and --

7 THE COURT: Correct. Okay. So you should get that
8 date from Ms. Lee. She was actually here so she knows that she
9 needs to give you that hearing within thirty days. I'm happy
10 if it's before then frankly but it should be at least within
11 that time frame.

12 MS. PENACHIO: Thank you, Your Honor. Your Honor,
13 there's one last motion. That's the Union's motion to --

14 THE COURT: Oh, yeah, that's unopposed.

15 MS. PENACHIO: That's unopposed and --

16 THE COURT: And it does appear that the Union didn't
17 get sufficient notice and -- of the bar date. I'll grant your
18 motion to file a late proof of claim.

19 MS. BRUNO: Thank you, Your Honor. If I may just
20 make a correction to debtor's counsel -- by the way, I'm Susan
21 Bruno from Cary Kane. Actually, the motion is not on behalf of
22 the Union --

23 THE COURT: It's the Fund.

24 MS. BRUNO: -- the Fund is a separate entity --

25 THE COURT: Right.

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1 MS. BRUNO: -- fund.

2 THE COURT: Right. The Union Fund.

3 MS. BRUNO: Yes. Thank you, Your Honor.

4 THE COURT: Right. So --

5 MR. WALDMAN: And --

6 THE COURT: -- you can e-mail that order to chambers.

7 MR. WALDMAN: Pepsi's motion for stay relief will be
8 adjourned --

9 THE COURT: It's adjourned.

10 MR. WALDMAN: -- to the hearing date.

11 THE COURT: And it probably will become moot if the
12 sale goes through but if for some reason the sale doesn't go
13 through I'm in all likelihood going to grant it.

14 MR. WALDMAN: Thank you.

15 THE COURT: Okay.

16 MS. PENACHIO: Thank you, Your Honor.

17 MR. WALDMAN: Thank you, Your Honor.

18 (Concluded at 12:53 p.m.)

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C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript
from the electronic sound recording of the proceedings in the
above-entitled matter.

Kathleen M. Price

DATE: November 14, 2014

Kathleen Price, AAERT Cert. No. 325

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